No. 75-1702

In the Supreme Court of the United States

OCTOBER TERM, 1976

EDWARD J. BARRY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A17-A27) is reported at 528 F. 2d 1094. The opinions of the district court (Pet. App. A1-A16) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 13, 1976. A petition for rehearing was denied on February 24, 1976. The petition for a writ of certiorari was filed on May 24, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a district judge may preside over a trial that will be controlled by legal principles on which the judge may have taken a position while serving as United States Attorney.

2. Whether the prosecution misrepresented to the district judge facts relevant to his recusal decision.

3. Whether the district court abused its discretion in limiting discovery.

4. Whether, on the facts of this case, there should have been an evidentiary hearing on petitioners' motion for relief under 28 U.S.C. 2255.

STATUTORY PROVISION INVOLVED

28 U.S.C. 455 provides:

> Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioners were convicted of conspiracy to commit extortion, in violation of 18 U.S.C. 1951. Petitioners Batastini, Eshoo, Flagg, Geraghty, Grana, Schillinger, Swallow, West, and Braasch also were convicted of making false declarations before a grand jury, in violation of 18 U.S.C. 1623. Petitioners were sentenced to varying terms of imprisonment. The court of appeals affirmed. *United States* v. *Braasch*, 505 F. 2d 139, certiorari denied *sub nom. Barry* v. *United States*, 421 U.S. 910.

On November 26, 1974, thirteen months after the verdicts of guilty, petitioners filed a motion in the district court seeking collateral relief pursuant to 28 U.S.C. 2255. For the first time, they claimed that District Judge William

J. Bauer, who had presided at their trial, should have recused himself.

Petitioners asserted that the investigation leading to their prosecution began during Judge Bauer's term as United States Attorney for the Northern District of Illinois, and that he knew about the investigation. Petitioners also maintained that Judge Bauer made the policy decision to prosecute police extortion under the Hobbs Act (18 U.S.C. 1951), thereby acquiring a "substantial interest" in prosecutions based upon that theory. These assertions were founded upon an affidavit of Thomas A. Foran, Judge Bauer's predecessor as United States Attorney. The affidavit stated in essence that Foran believed that, while United States Attorney, he had received information concerning one or more of the petitioners (Pet. App. A6).

After petitioners' trial, Judge Bauer was appointed to the court of appeals. The collateral proceedings were assigned to Judge McGarr, and discovery began with the deposition of Foran.[1] Foran stated that in 1970 he had received an informational memorandum from the Federal Bureau of Investigation in connection with a matter unrelated to the instant case. The memorandum mentioned petitioner Braasch and police payoffs; Foran characterized the information as "almost in the rumor stage," and concluded that it did not represent the results of an investigation. Foran stated that he never discussed the matter with United States Attorney Bauer.

Based upon this deposition and an affidavit of Special Agent James J. Annes, who swore that the investigation began in May 1972, the district court concluded (Pet.

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[1]The deposition is summarized (Pet. App. A6-A8) in the second opinion of the district court.

App. A8) that the investigation leading to petitioners' indictment began after Judge Bauer left the office of United States Attorney in November 1971.[2] Despite his belief that "the proof of the allegations of petitioners [was] so negligible as to consist virtually of unsupported assertions," Judge McGarr continued the case to allow Judge Bauer to respond by affidavit (Pet. App. A11).

Judge Bauer's affidavit denied any discussions, decisions or knowledge of facts related to this case. Petitioners then filed additional affidavits stating that prior to May 1972 agents may have questioned tavern owners in petitioners' district concerning police extortion. Judge McGarr concluded (Pet. App. A14) that these supplementary affidavits were not inconsistent with the Annes affidavit. He also rejected petitioners' argument that Judge Bauer's alleged participation in legal discussions leading to the novel interpretation of the Hobbs Act required his recusal, reasoning that "[a] general policy decision to interpret or apply a statute in a given way, is not a case nor a decision made within the context of a case" (Pet. App. A15). Judge McGarr therefore granted the government's motion for summary judgment (Pet. App. A16). The court of appeals affirmed in a comprehensive opinion.

ARGUMENT

1. Petitioners contend that Judge Bauer "actively participated" (Pet. 27) in the preparation of their case as United States Attorney before his appointment to the bench, and therefore that 28 U.S.C. 455 required him

[2]An affidavit of petitioner Seno also was considered by Judge McGarr, which found it to be "a sworn statement by a felon with an interest in the outcome of a case, reciting hearsay information from an unidentified source" and lending no support to petitioners' claims (Pet. App. A10).

to recuse himself.[3] See *Laird* v. *Tatum*, 409 U.S. 824, 828 (Rehnquist, J., in chambers).

Section 455 applies only to "any case" to which a judge has had a specified relationship.[4] Recognizing the significance of the limitation, the court of appeals properly followed *United States* v. *Wilson*, 426 F. 2d 268, 269 (C.A. 6) (see Pet. App. A21):[5]

> A "case" does not, of course, necessarily come into being with the happening of the offense. The critical point for *mandatory* disqualification is, we think, the initiation of the prosecution. For purposes of 28 U.S.C. §455, we believe that a "case" begins with the first formal prosecutorial proceedings (arrest, complaint or indictment) which is designed to bring a named alleged offender before the court.

See also *In re Grand Jury Investigation*, 486 F. 2d 1013, 1015-1016 (C.A. 3), certiorari denied *sub nom. Testa* v.

[3]Petitioners did not ask Judge Bauer at trial to disqualify himself. They raised the issue for the first time in their Section 2255 petition. The court of appeals considered this factor and, agreeing with *United States* v. *Amerine*, 411 F. 2d 1130, 1134 (C.A. 6), held that the mandatory provisions of 28 U.S.C. 455 preclude any waiver of objections (Pet. App. A20 n. 7). We disagree. *Zovluck* v. *United States*, 448 F. 2d 339, 343 (C.A. 2), certiorari denied, 405 U.S. 1043; *Adams* v. *United States*, 302 F. 2d 307, 310 (C.A. 5); *Ramirez* v. *United States*, 294 F. 2d 277, 283 (C.A. 9). Because the court of appeals reached the merits of petitioners' arguments, however, there is no occasion to resolve this conflict.

[4]This language was eliminated when the statute was amended in 1974. The amendment is inapplicable here because the trial preceded the effective date of the statute. Pub. L. No. 93-512, 88 Stat. 1609. Because of this amendment the problems presented by this case have little continuing importance.

[5]Petitioners' argument (Pet. 27) that the instant case conflicts with *Wilson* is groundless. The court of appeals explicitly followed *Wilson*. See Pet. App. A21, A22.

United States 417 U.S. 919 (there is no "case" until there has been an arrest or indictment).

The court of appeals correctly held (Pet. App. A21-A22) that the affidavits and deposition showed without contradiction that no "case" existed during the term of United States Attorney Bauer. No arrests were made and no indictment was returned until after he left office.

Petitioners contend, however, that United States Attorney Bauer made the original policy decision to prosecute police extortion under the Hobbs Act, thereby "actively participated in the preparation of the case brought against petitioners" (Pet. 27) and requiring his disqualification. As there was no "case" in which to participate during Judge Bauer's tenure of office as United States Attorney, however, this argument is incorrect. Furthermore, notwithstanding the right of every litigant to a fair trial administered by an impartial judge, "neither the oath [of the federal judiciary], the disqualification statute, nor the practice of former Justices of this Court guarantees a litigant that each judge will start off from dead center in his willingness or ability to reconcile the opposing arguments of counsel with his understanding of the Constitution and the law." *Laird* v. *Tatum*, *supra*, 409 U.S. at 838-839.

Finally, as the court of appeals correctly held (Pet. App. A23), any error was harmless. At the conclusion of their trial, petitioners commended Judge Bauer for his fairness. And, as the court of appeals held on direct appeal from petitioners' conviction, Judge Bauer's interpretation of the Hobbs Act is correct. Petitioners were not aggrieved in any cognizable sense by the loss of an opportunity to benefit from the erroneous ruling some other judge might have made.

2. Asserting that the prosecution manipulated the reassignment of their case to Judge Bauer and then, to

retain the advantage of his "known favorable predisposition to the prosecution" (Pet. 34), misrepresented to him the commencement date of the investigation, petitioners contend (Pet, 33-35) that such actions amounted to prosecutorial misconduct requiring relief under 28 U.S.C. 2255. There is no supporting proof for these charges, however.[6] Both the district court (Pet. App. A8) and the court of appeals (Pet. App. A21) determined that the undisputed affidavit of Agent Annes established that the investigation began in May 1972, several months after Judge Bauer resigned as United States Attorney. The evidence offered by petitioners indicated only that the FBI may have made inquiries as early as 1970. As the court below aptly stated (Pet. App. A21-A22):

> [M]ere questioning of a few individuals does not meet the *Wilson* standard of attempting "to bring a named alleged defender [*sic*] before the court," nor does it constitute the formal opening of the prosecution required by both *Wilson* and [*In re Grand Jury Investigation, supra*]. No other evidence was presented to the district court that even tended to show that the prosecution either began or continued during the tenure of U.S. Attorney Bauer.

3. Petitioners contend (Pet. 14-26) that the denial of broader discovery and an evidentiary hearing violated 28 U.S.C. 2255. That section, however, requires no hearing when the record "conclusively shows" that the petitioner is entitled to no relief. *Fontaine* v. *United States*, 411 U.S. 213, 215; *Sanders* v. *United States*, 373 U.S. 1, 6; *Machibroda* v. *United States*, 368

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[6]The case was transferred pursuant to a procedure approved on direct appeal by the court of appeals. 505 F. 2d at 147.

U.S. 487, 494. The record may be expanded by the filing of affidavits, letters and other documentary evidence, and the district court may properly rely on the expanded record in denying a Section 2255 petition without a hearing. *Raines* v. *United States*, 423 F. 2d 526, 529-530 (C.A. 4); *United States* v. *Carlino*, 400 F. 2d 56, 58 (C.A. 2), certiorari denied, 394 U.S. 1013; *Mirra* v. *United States*, 379 F. 2d 782, 787 (C.A. 2), certiorari denied, 389 U.S. 1022. Furthermore, the scope of discovery permitted in collateral proceedings is within the discretion of the district court. *Harris* v. *Nelson*, 394 U.S. 286, 290.

The court of appeals examined the discovery procedures authorized by the district court in this case and properly concluded (Pet. App. A26) that the court did not abuse its discretion. On the basis of the expanded record, the courts below found petitioners' claims to be "a series of unsupportable allegations" (Pet. App. A16), "predicated on conjecture and speculation" (Pet. App. A27). The deposition of Thomas Foran showed that no investigation began while he was in office and, together with Judge Bauer's affidavit, established that no information regarding petitioners had been given to United States Attorney Bauer. The affidavit of Agent Annes, giving the starting date of the investigation as May 1972, was not contradicted by affidavits filed by petitioners, which showed only that several individuals had been questioned earlier (Pet. App. A14). There was no need to determine the credibility of conflicting affiants, and petitioners' argument that the expansion of the record procedures and denial of a hearing violated Section 2255 is unavailing.

The new rules governing Section 2255 proceedings (Pet. App. A29) become effective August 1, 1976, and are therefore inapplicable here. No court has interpreted the new rules for Section 2255 cases, and there is no need for this Court to do so in the absence of a conflict among the circuits.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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